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No. 96585-4

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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LAKEHAVEN WATER AND SEWER DISTRICT, HIGHLINE  
WATER DISTRICT, and MIDWAY SEWER DISTRICT,  
Municipal corporations,

Appellants,

v.

CITY OF FEDERAL WAY, a municipal corporation,

Respondent.

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**BRIEF OF AMICUS CURIAE  
ALDERWOOD WATER & WASTEWATER DISTRICT  
IN SUPPORT OF APPELLANTS**

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## **I. IDENTITY AND INTEREST OF AMICUS**

Like the Appellants, Alderwood Water & Wastewater District (AWWD) is a municipal corporation organized under Title 57 RCW. AWWD is the largest water and sewer district in the State of Washington, serving a population of over 130,000 residents. AWWD's service area is approximately 44 square miles and includes portions of the cities of Bothell, Brier, Lynnwood, Mill Creek, and Mukilteo as well as unincorporated areas of south Snohomish County. In addition, AWWD provides wholesale water service to the cities of Edmonds, Lynnwood and Mountlake Terrace—enabling those cities to provide potable water to their own citizens. AWWD also owns and operates a wastewater treatment plant. AWWD's mission statement is: "Clean, reliable water and wastewater service for a healthy community." The mission is not to make money or turn a profit.

AWWD has an interest in this case because if affirmed, the City of Federal Way's utility tax may inspire other cities around the state to adopt a similar tax. AWWD faces the prospect of utility taxes imposed by five different cities, at five different rates and using five different definitions of what AWWD revenues are subject to the tax. This would significantly increase the cost of water and sewer for residents living in the

incorporated parts of AWWD's service area, who would ultimately pay the excise tax levied by their cities on AWWD. It would also impose a significant burden upon a regional government. AWWD would need to calculate the different costs of the same services by jurisdiction. This in turn would require investing in more expensive billing software—to track and reconcile a much more complex cost of service model—and paying higher auditing costs. The State Auditor's Office would insist on documentation that the correct excise tax rates were properly applied to property owners in each jurisdiction.

## **II. ISSUE ADDRESSED BY AMICUS**

Is a municipal corporation's domestic water or sewer service a governmental function where (a) in the current century, such services are normally performed by the public sector; and (b) in *King County v. City of Algona*, this Court held that a county's solid waste disposal for a fee is a governmental function?

## **III. STATEMENT OF THE CASE**

AWWD adopts the Appellant Districts' statement of the case.

## **IV. ARGUMENT**

At issue is whether the archaic, confusing and contradictory governmental/proprietary distinction should apply to governmental water

and sewer providers in the twenty-first century. In Washington, the concept of municipal water as a proprietary function was originally rooted in government tort immunity cases. That context no longer applies. Similarly the rationale of those cases—that a municipality providing potable water engages in an activity normally performed by the private sector—is no longer true. Finally, in terms of governmental versus proprietary, there is no logical way to distinguish water or sewer from solid waste disposal. When performed by the government, all three are governmental functions.

The Court should reverse the trial court's summary judgment order. The Districts provide water and sanitary sewer services, which are governmental functions. As a matter of law, the Appellant Districts are immune from the City of Federal Way's tax.

**A. Origins of Municipal Water Service as Proprietary Function**

The earliest Washington cases referencing a public water system as a proprietary function arose in the context of government immunity from tort liability. *Bjork v. City of Tacoma*, 76 Wash. 225, 228, 135 P. 1005 (1913)(drowning death of three-year-old child who fell into an abandoned city-owned flume); *Aronson v. City of Everett*, 136 Wash. 312, 316, 239 P. 1011 (1925)(wrongful death caused by city's contaminated drinking water); *Shandrow v. City of Tacoma*, 188 Wash. 389, 62 P.2d 1090

(1936)(plaintiff fell into a construction hole created by city to repair a water line).

Absent a finding that city water service was proprietary, the plaintiffs in those cases could not recover for their significant and meritorious claims. Prior to 1961, a city was immune from liability for its governmental acts but not its proprietary acts.<sup>1</sup>

Yet *Bjork* and its progeny include no explanation why municipal water was a proprietary as opposed to a governmental function. Instead the Court stated the rule without elucidating the underlying rationale. “[A] city engaged in furnishing water, electricity or other kindred services to its inhabitants *for a profit* is liable for negligence the same as any private corporation engaged in the same business.” *Aronson*, 136 Wash. at 316. (Emphasis supplied.) Moreover, the stated rule does not appear applicable to Title 57 water and sewer districts because they do not furnish services for a profit.

**B. Proprietary Means “Normally” Performed by Private Sector**

In 1951, the Court at last explained why city water service was a proprietary function in the context of another tort case. *Russell v. City of*

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<sup>1</sup> In 1961, the state of Washington waived sovereign immunity. 1961 Wash. Laws 136. That waiver is codified in RCW 4.92.090: “The state of Washington, whether acting in its *governmental or proprietary* capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.” (Emphasis supplied.)

*Grandview*, 39 Wn.2d 551, 236 P.2d 1061 (1951). In *Russell* combustible gas from city water wells caused an explosion, destroying a home and injuring the residents, who sued for negligence. The city claimed nonliability on the theory that its water system was a governmental function. The Court rejected that argument, citing *Bjork*, *Aronson* and *Shandrow*. *Id.* at 553. The Court explained the basis for these holdings: “Cities are limited governmental arms of the state, and when permitted by the state to engage in activities *normally performed by private enterprise*, they, *to that extent*, depart from their governmental functions.” *Id.* (Emphasis supplied.) In other words, municipal water service was proprietary not because it could be performed by the private sector but because it normally is performed by the private sector.

Division III cited *Russell*, and referenced its citations to prior Washington decisions, for the proposition that operating a water system is a proprietary function. *City of Wenatchee v. Chelan Cty. Pub. Util. Dist. No. 1*, 181 Wn. App. 326, 342, 325 P.3d 419 (2014). That court did not, however, discuss or explain the *Russell* court’s rationale—that public water is proprietary because it is “normally” performed by the private sector. Perhaps that was true in 1913, or even 1951, but it is no longer true today.

**C. Today Water and Sewer Normally Provided by Public Sector**

In the twenty-first century, there is a new normal. According to Judge Fearing, an overwhelming majority of the population receives water and wastewater service from the public sector. *Id.* at 353 (citing 2002 Congressional Budget Office study that government supplies 85% of water needs and 97% of wastewater treatment.) The Districts provide further support for this proposition at the local level. App. Br. at 31 n.39 (quoting CP 113).

Moreover, water is more than just another retail commodity. Water is a basic human need. So too wastewater service is critical to public health. Although the private sector can provide water or sewer service, today the normal and typical providers are government entities such as cities, the Appellant Districts and AWWD.

Whether a local government providing water or sewer service is acting in a governmental capacity, requires a fresh examination in light of legal and societal developments over the past several decades. With the abolition of government tort immunity in 1961, the context of *Russell*, *Bjork*, *Aronson* and *Shandrow* no longer applies. Similarly, the underlying rationale of *Russell* is no longer true. Potable water and sewer services have evolved in the past 100 years. The private sector is no longer the normal provider. In fact, that is now the exception. This

fundamental change distinguishes this case from *Russell* and its antecedents, and compels a different result.<sup>2</sup>

**D. Like Solid Waste Disposal for a Fee, Water and Sewer Services are Governmental Functions**

The trial court's order, relying upon Division III's *Wenatchee* decision, conflicts with this Court's decision in *King County v. City of Algona*, 101 Wn.2d 789, 681P.2d 1281 (1984). In *Algona*, the Court invalidated a city's tax on revenues from a county solid waste transfer station. The Court rejected the city's argument that the facility was proprietary. On the contrary, because the facility's purpose was "public or governmental in nature . . . [w]e hold that King County was operating in a governmental function." *Id.* at 794.

In terms of governmental versus proprietary, there is no logical distinction between solid waste disposal and water or sewer. All three fulfill basic human needs and further public health. It is true that a private enterprise could provide such services, but today a governmental entity is the normal and typical provider of potable water and sewer services. *Algona* controls this case and mandates reversal.

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<sup>2</sup> The concurring opinion in *Wenatchee* identifies six different tests that courts have articulated to distinguish between governmental and proprietary functions. *Wenatchee*, 181 Wn. App. at 352-53. "The six tests collide in the context of the supply of domestic water . . . by a municipal corporation not for its own profit." *Id.* at 353. In *Russell*, this Court followed the third of the six tests—whether the government services are normally performed by the private sector. Application of that test in today's context yields a different result.

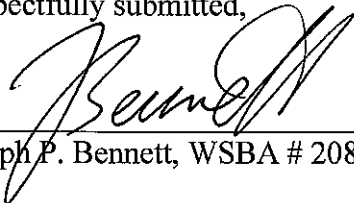
The City of Federal Way's utility excise tax should not apply to local governments providing governmental services. As the Appellant Districts cogently stated: "[T]he provision of water services, and the collection, treatment, and disposal of sewage are untaxable governmental services." App Br. at 43.

## V. CONCLUSION

This Court should take notice of the fundamental evolution in the provision of water and wastewater services in the past century. Units of government, including the Appellant Districts and amicus AWWD, are now the normal providers of these essential services. Decades-old tort cases, pre-dating the State's waiver of sovereign immunity, can no longer justify the mischaracterization of municipal water and sewer as "proprietary." As with solid waste disposal, providing potable water and wastewater service is a governmental function. The lower court's order should be reversed and *City of Wenatchee* should be overruled.

DATED THIS 2nd day of December, 2019.

Respectfully submitted,



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### DECLARATION OF SERVICE

On the date below, I electronically served a true and accurate copy of the Brief of Amicus Alderwood Water & Wastewater District in Supreme Court Cause No. 96585-4 to counsel indicated below:

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Original e-filed with:  
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

December 2<sup>nd</sup>, 2019.

  
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December 02, 2019 - 4:09 PM

## Transmittal Information

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